

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Duke Power, a division of Duke Power Corporation	Docket Nos. ER96-110-010 ER96-110-011 ER96-110-012 EL05-4-000
Duke Energy Marketing America, LLC	ER03-956-002 ER03-956-003
Duke Energy Moss Landing LLC	ER98-2680-007 ER98-2680-008
Duke Energy Morro Bay LLC	ER98-2681-007 ER98-2681-008
Duke Energy Oakland LLC	ER98-2682-007 ER98-2682-008
Duke Energy South Bay LLC	ER99-1785-006 ER99-1785-007
Bridgeport Energy, LLC	ER98-2783-006

ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION
206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued December 15, 2004)

1. On August 11, 2004, as amended on November 19, 2004 and November 24, 2004, Duke Power, a division of Duke Power Corporation (Duke Power), Duke Energy Marketing America, LLC (DEMA), Duke Energy Moss Landing LLC (Moss Landing), Duke Energy Morro Bay LLC (Morro Bay), Duke Energy Oakland LLC (Oakland), Duke Energy South Bay LLC (South Bay), and Bridgeport Energy, LLC (Bridgeport) (collectively, the Duke Companies) submitted for filing updated market power analyses

in compliance with the Commission's order issued on May 13, 2004.¹ The May 13 Order addressed the procedures for implementing the market power analysis announced on April 14, 2004, and clarified on July 8, 2004.² The filing submitted by Duke Power, as amended, indicates that it passes the pivotal supplier screen but fails the wholesale market share screen for each of the four seasons considered in Duke Power's control area³ and passes both the pivotal supplier screen and the wholesale market share screen in each directly interconnected control area. Duke Power passes the wholesale market share screen for each directly interconnected control area examined with a market share of less than 11 percent in each of the four seasons considered. The compliance filings submitted individually by DEMA, and jointly by Moss Landing, Morro Bay, Oakland and South Bay (collectively, Duke California Companies) indicate that the entities pass both the pivotal supplier screen and wholesale market share screen in the California ISO control area. The Duke California Companies pass the wholesale market share screen for each control area examined with a market share of less than 15 percent in each of the four seasons considered. In addition, intervenors have submitted comments requesting that the Commission condition the market-based rate authority of DEMA and the Duke California Companies on the California Independent System Operator Corporation (CAISO) having sufficient market power mitigation mechanisms in place for the next three years. Finally, Bridgeport submitted a compliance filing indicating that it presumptively lacks generation market power pursuant to section 35.27 of the Commission's regulations.⁴

2. As we stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a section 206 proceeding and establishes a rebuttable presumption of market power in the section 206 proceeding.⁵ Accordingly, in this order the Commission institutes a proceeding pursuant to section 206 of the Federal Power Act (FPA)⁶ to determine

¹ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

² *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

³ Duke Power's analysis shows that it has a market share as high as 72 percent, in Duke Power's control area market.

⁴ 18 C.F.R. § 35.27 (2004).

⁵ April 14 Order, 107 FERC ¶ 61,018 at P 201.

⁶ 16 U.S.C. § 824e (2000).

whether Duke Power may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the Duke Power control area because the filing indicates that this is the geographic market for which Duke Power fails the wholesale market share screen.

3. The submittals of DEMA, the Duke California Companies and Bridgeport, as discussed below, comply with the Commission's requirements for market-based rate authority.

4. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

Background

5. Duke Power filed an updated market power analysis on December 17, 2001 in Docket No. ER96-110-007. Notice of that filing was published in the *Federal Register*⁷ with interventions or protests due on or before January 7, 2002. North Carolina Municipal Power Agency No. 1 (NCMPA1) filed comments regarding the updated market power analysis. NCMPA1 stated that it took no position at the time regarding the updated analysis because it was engaged in discussions with Duke Power regarding the realignment of its power supply arrangements, and thus its ability to compete in regional markets. NCMPA1 stated that it reserved its right to file comments taking a position on the analysis at a later date, depending on the outcome of its negotiations with Duke Power.

6. The Duke California Companies filed an updated market power analysis on June 25, 2001, in Docket Nos. ER98-2680-002, ER98-2681-002, ER98-2682-002, and ER99-1785-001. Notice of that filing was published in the *Federal Register*⁸ with interventions or protests due on or before July 16, 2001. Motions to intervene were filed by the Public Utilities Commission of the State of California (California Commission), the CAISO, California Energy Oversight Board (CEOB), and Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SCE).

7. In the June 25, 2001 market power analysis, the Duke California Companies utilized the hub and spoke analysis then required by the Commission. Several interveners

⁷ 66 Fed. Reg. 67,241 (2001).

⁸ 66 Fed. Reg. 35,607 (2001).

filed protests regarding this filing. The California Commission, the City and County of San Francisco, CEGB, and PG&E and SCE each asserted that the hub and spoke analysis utilized by the Duke California Companies was an inappropriate tool to assess the ability of individual suppliers to exercise market power in California, given what they described as an anti-competitive market environment in the state. PG&E and SCE also argued that any grant of market-based rate authority to the Duke California Companies should be conditioned on additional reporting and monitoring requirements, again given the market environment in California. Additionally, the California Commission asserted that there is evidence that the Duke California Companies abused affiliate relationships, in particular through its purchase of gas fuel from an affiliate company.

8. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. We further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power analysis altogether and go directly to mitigation.⁹ The May 13 Order directed Duke Power to file, within thirty days of the issuance of that order, a generation market power analyses pursuant to the two indicative screens.¹⁰

9. On August 11, 2004, Duke Power, DEMA, the Duke California Companies, and Bridgeport filed updated market power analyses. On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to the Duke Companies' submittals.

10. On November 19, 2004, in Docket Nos. ER96-110-012, ER03-956-003, ER98-2608-008, ER98-2681-008, ER98-2682-008 and ER99-1785-007, the Duke Companies

⁹ In addition, as the Commission stated in the April 14 Order, 107 FERC ¶ 61,018 at P 37, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power.

¹⁰ July 8 Order, 108 FERC ¶ 61,029 at Ordering Paragraph (B).

filed their responses to the data request. Duke Power submitted a supplemental response on November 24, 2004.

Description of The Duke Companies' Compliance Filings

A. Duke Power

11. Duke Power states that it passes the pivotal supplier screen in Duke Power's control area and in each directly interconnected control area. Duke Power further states that it passes the wholesale market share screen in each directly interconnected control area but fails the wholesale market share screen for each of the four seasons considered in the Duke Power control area. In response to this failure, Duke Power notes that the Commission's wholesale market share screen would most likely overstate an applicant's share of off-peak uncommitted capacity in its own control area because it ignores the level of third-party loads during off-peak periods and the numbers of competitors available to serve those loads. Duke Power states that a more detailed analysis of the actual market conditions in its control area is required.

12. In an effort to rebut the presumption that it has market power as indicated by its failure of the wholesale market share screen, Duke Power submitted historical sales data and other information it considers relevant. According to Duke Power, it does not have market power for the following reasons: (1) there is a relatively small amount of wholesale load in the Duke Power control area compared to the overall level of supply in the control area; (2) Duke Power does not own or control a substantial amount of temporarily excess generation in relation to the size of its own peak load, and thus is limited in the amount of firm long-term power it can sell from its own resources to load-serving entities; (3) the largest load-serving entities in the control area own a share of the Catawba Nuclear Generating Station which is a baseload resource that provides them access to very low-cost energy; and (4) Duke Power's transmission system is generally not constrained. Duke Power further states that by examining its historical sales price data for 2003, as well as the results from request for proposals, it has confirmed the absence of evidence of market power and that it does not play a dominant role in the short- or long-term markets in its own control area.

13. In response to the Commission's data request, on November 19, 2004 Duke Power provided additional information regarding the pivotal supplier and wholesale market share screens, long-term firm non-requirement market sales, the stability and voltage transfer limits in effect for the applicable historical seasons, and the historical sales data and other relevant information filed by Duke Power.

B. DEMA and the Duke California Companies

14. In their compliance filings, DEMA and the Duke California Companies submit the results of the two generation market power screens. DEMA and the Duke California Companies state that the results of the pivotal supplier analysis for the CAISO control area market indicate that they are not pivotal suppliers in that market. DEMA and the Duke California Companies further state that they satisfy the wholesale market share screen in each of the four seasons considered in CAISO's control area market.

15. DEMA is affiliated with Duke Energy Mohave, LLC, which owns 50 percent of Griffith Energy LLC, a generating facility located in the Western Area Power Administration control area, and Duke Energy Arlington Valley, LLC, a generation facility located in the Arizona Public Service Company/Salt River Project Irrigation District control area (New Facilities). DEMA asserts that pursuant to the Commission's April 14 Order and section 35.27 of the Commission's regulations, the New Facilities presumptively lack generation market power because their generation facilities were constructed after July 9, 1996. Accordingly, DEMA asserts that it is not required to submit a generation market power analysis to demonstrate that the New Facilities lack market power in their relevant geographic control areas. DEMA concludes that, since the new facilities lack generation market power, they also presumptively lack generation market power in the new facilities' geographic markets.

16. In response to the Commission's October 29, 2004 data request, DEMA provided seasonal import limitations and revised indicative screen analyses that use those import limitations and 2003 demand data that had become available since DEMA's last filing.

C. Bridgeport

17. In its updated market power analysis, Bridgeport, which is located in ISO New England, cites section 35.27(a) of the Commission's regulations, which provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.¹¹ Bridgeport states that it presumptively lacks generation market power under this regulation because its facility was constructed after July 9, 1996. Additionally, Bridgeport notes that the only generation-owning affiliate of its parent company located in the area, Casco Energy, also presumptively lacks generation market power under section 35.27 of the Commission's regulations.

¹¹ 18 C.F.R. § 35.27(a) (2004).

Notice of Filing and Responsive Pleadings

18. Notice of the Duke Power, Duke California Companies and Bridgeport compliance filings were published in the *Federal Register*¹² with interventions or protests due on or before September 1, 2004. Notice of the DEMA compliance filing was published in the *Federal Register*¹³ with interventions or protests due on or before August 24, 2004. Notice of Duke Power's August 17, 2004 errata was published in the *Federal Register*¹⁴ with interventions or protests due on or before September 7, 2004. Notice of the responses by the Duke Companies to the Commission's data request was published in the *Federal Register*¹⁵ with interventions or protests due on or before December 7, 2004. Notice of Duke Power's supplemental response to the Commission's data request was published in the *Federal Register*¹⁶ with interventions or protests due on or before December 15, 2004.

A. Motion to Intervene Regarding the Duke Power Compliance Filing

19. A motion to intervene raising no substantive comments regarding the Duke Power compliance filing was submitted by North Carolina Electric Membership Corporation.

B. CAISO Comments on DEMA Compliance Filing and DEMA Answer

20. On August 24, 2004, CAISO filed a motion to intervene with comments regarding the DEMA compliance filing, requesting that the Commission condition DEMA's market-based rate authority on the CAISO having sufficient market power mitigation mechanisms in place for the next three years. CAISO states that although it does not protest the DEMA triennial market power review, it suggests that when other factors are taken into account, such as actual supplies available inside the CAISO system, practical limitations on imports, hydroelectric supplies and other resources during peak periods, DEMA fails to pass the market share screen. The CAISO believes that over the next three years, supply and demand will continue to require that DEMA's market-based rate

¹² 69 Fed. Reg. 52,005 (2004).

¹³ 69 Fed. Reg. 52,006 (2004).

¹⁴ 69 Fed. Reg. 53,056 (2004).

¹⁵ 69 Fed. Reg. 69,596 (2004).

¹⁶ 69 Fed. Reg. 71,023 (2004).

authority be conditioned by market power mitigation mechanisms in the CAISO. Also, CAISO argues that the Commission's interim measures do not address locational market power within the ISO system. The CAISO believes that DEMA's market-based rate authority must continue to be conditioned by locational market power mitigation mechanisms in the ISO.

21. The CEOB states, in its September 1, 2004, motion to intervene and comments on the Duke California Companies' filing (described below), that it is in agreement with the CAISO on these issues.

22. On September 22, 2004, DEMA filed an answer to CAISO's August 24 filing. DEMA states that the Commission should disregard the CAISO's comments to the extent that CAISO is asking the Commission for a generic ruling with respect to the need for or adequacy of mitigation measures established in the CAISO's tariff, because such a request is beyond the scope of this proceeding. Also, DEMA notes that the CASIO does not protest or contest the fact that DEMA and its affiliates (including the Duke California Companies) pass the pivotal supplier and wholesale market share screens in accordance with the Commission's requirements. Instead, according to DEMA, the CAISO is essentially proposing the use of different models to measure DEMA's and the Duke California Companies' pivotal supplier and wholesale market share status. DEMA further argues that the Commission has stated that modified models or screens are not permissible. However, in its answer, DEMA used CAISO's screen, with certain modifications, and asserted that it still passed both screens in all geographic areas.

23. On October 6, 2004, CAISO filed an answer to DEMA's answer restating their previous request for continued mitigation.

C. CEOB Comments on Duke California Companies' Filing

24. On September 1, 2004, the CEOB filed a motion to intervene and comments regarding the Duke California Companies' updated market power analyses, stating that it does not necessarily agree that the Commission's interim screen methodology is appropriate to adequately assess the potential for sellers, including the Duke California Companies, to exercise market power in the California energy markets, particularly given the locational market power concerns within the CAISO control area.

Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept DEMA's answer because it has provided information that assisted us in our decision-making process.

Discussion

Market-Based Rate Authorization

27. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.¹⁷

A. Duke Power

Generation Market Power

28. Duke Power states in its compliance filing, as amended, that Duke Power's share of uncommitted capacity in Duke Power's control area exceeds 20 percent in each of the four seasons during the time period considered. Consequently, Duke Power fails the market share screen in the Duke Power control area.

29. Duke Power states that it passes the pivotal supplier screen and the wholesale market share screen in each directly interconnected control area. After examination of Duke Power's import assumptions, we find that it has satisfied the Commission's concerns regarding generation market power in its first tier control areas. Further, the Commission finds that Duke Power has complied with the directives in the April 14 Order, as clarified by the July 8 Order, regarding performing a simultaneous transmission import capability study and relies on the results of that study herein.

30. In its submission, Duke Power presents alternative evidence including historical sales data and other data that it feels to be relevant to rebut the presumption of market power. According to Duke Power it does not have market power because there is a relatively small amount of wholesale load in its control area compared to the overall level of supply in its control area, it does not own nor control a substantial amount of temporarily excess generation in relation to the size of its own peak load, and thus is

¹⁷ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,921-22 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899-900 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

limited in the amount of firm long-term power it can sell from its own resources to load-serving entities. Duke Power also claims that the largest load-serving entities in the control area own a share of the Catawba Nuclear Generating Station which is a baseload resource that provides them access to very low-cost energy and its transmission system is generally not constrained. Duke Power states that by presenting its historical sales price data for 2003 and the results from request for proposals it has shown its lack of market power in its control area.

31. The Commission stated in the April 14 and July 8 Orders that applicants may present historical evidence to show that the applicant satisfies the generation market power concerns, however, the evidence that will be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area.¹⁸ Duke Power's historical sales data and other relevant information, and the response to the Commission's data request that was filed on November 24, 2004, regarding this information, is under review. We will further examine this information in conjunction with other evidence submitted in the section 206 proceeding we institute herein.

32. As outlined in the April 14 Order, Duke Power's failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the Duke Power control area, to determine whether Duke Power may continue to charge market-based rates and establishes a rebuttable presumption of market power in this control area. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

33. Our decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Duke Power has market power in the Duke Power control area. As discussed in the April 14 and July 8 Orders, the indicative screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, for the Duke Power control area, Duke Power will have 60 days from the date of issuance of this order finding a screen failure to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.¹⁹ In addition, as the Commission stated in

¹⁸ April 14 Order, 107 FERC ¶ 61,018 at P 102.

¹⁹ April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

the April 14 Order,²⁰ applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power.

34. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the Federal Register, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,²¹ we will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-4-000 is published in the Federal Register. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by April 29, 2005.

Transmission Market Power

35. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Duke Power states that it has an OATT on file with the Commission. We note that Duke Power's OATT was accepted in an unpublished letter order in Docket No. OA97-654-000. No intervenor has raised concerns regarding transmission market power. Based on Duke Power's representation, we find that Duke Power satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Barriers to Entry

36. Duke Power has gas transportation affiliates that provide interstate transportation and storage of natural gas for customers primarily in the Mid-Atlantic, New England and Southeastern states. Duke Power states that the affiliated pipelines do not provide natural gas transportation service to the Duke Power control area and to the extent they transport gas to markets that are first-tier to the duke control area, there is sufficient competition

²⁰ April 14 Order, 107 FERC ¶ 61,018 at P 37.

²¹ See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

from other pipelines such that the relevant upstream markets are not highly concentrated. These interstate pipelines are also subject to the Commission's open access transportation requirements set forth in Order No. 636. Duke Power also states that neither it nor its affiliates can exercise control over sites for generating plants such that it could restrict entry by other suppliers. No intervenor has raised concerns regarding barriers to entry. Based on Duke Power's representations, we find that Duke Power and its affiliates cannot erect barriers to entry.

Affiliate Abuse

37. The Commission is also concerned with the potential for affiliate abuse and reciprocal dealing. Duke Power states that it operates under a code of conduct that is consistent with the Commission's requirements and that has been determined to be sufficient to prevent affiliate abuse and reciprocal dealing. No intervenor has raised concerns regarding affiliate abuse. Based on Duke Power's representation, we find that Duke Power satisfies the Commission's concerns with regard to affiliate abuse.

B. DEMA and the Duke California Companies

Generation Market Power

38. DEMA and the Duke California Companies state in their compliance filings that the results of the pivotal supplier analysis for the CAISO control area and for each of the first-tier control areas indicate that they are not pivotal suppliers in either the CAISO market or in any of its first-tier markets. DEMA and the Duke California Companies further state that they satisfy the wholesale market share screen in each of the four seasons considered in the CAISO market.

39. In its motion to intervene and comments, CAISO states that although it does not protest DEMA's triennial update, it suggests that the Commission condition the market-based rate authority of all sellers (including the Duke California Companies) on the CAISO having sufficient market power mitigation mechanisms in place for the next three years on a system-wide and locational basis.

40. The CAISO states that DEMA assessed the amount of supply available to compete in the California ISO market based primarily on "nameplate" data for generation and transmission capacities. Acknowledging that the Commission's April 14 and July 8 Orders provide for the use of nameplate data, the CAISO points out that the Commission also recognized that use of nameplate data may overestimate supply and provided that interveners may present historical data including the analyses that they believe most accurately represent market conditions. In addition, CAISO states that the Commission clarified that neither failure nor passage of the screens is definitive and that both

applicant and interveners may present historical evidence to provide additional indications of market power.

41. CAISO asserts that its own analysis based on historical data reflecting actual supply offered in the CAISO market under a variety of supply and load conditions presents a more accurate picture of DEMA's potential market power over the coming three years. In addition to using actual available supply from resources which reflects limitations due to hydroelectric supplies and other renewable energy sources, forced outages and transmission limitations, the CAISO analysis employed a more current test period than the DEMA submittal and a proxy for imports calculated on peak hours for both the pivotal supplier and market share analyses.

42. The CAISO analysis indicates that DEMA passes the pivotal supplier screen using historical data, however, the margin of uncommitted rival supply is lower than indicated by DEMA's filing. The CAISO states that according to its analysis, DEMA's wholesale market share is 0.1 percentage points above the Commission's 20 percent threshold in the summer season, and 3.7 and 2.7 percentage points above the threshold in the winter and spring seasons, respectively. The CAISO states that these results suggest that market power remains a concern in the ISO markets. As a result, the CAISO believes that DEMA's market-based rate authority should continue to be conditioned by market power mitigation mechanisms in the ISO Tariff and by locational market power mitigation mechanisms in the ISO Tariff.

43. In its answer filed on September 22, 2004, DEMA states the Commission should reject the CAISO's requested relief since it is unnecessary and beyond the scope of this proceeding. DEMA states that the ISO is asking the Commission for a generic ruling with respect to the need for or adequacy of mitigation measures established in the CAISO's tariff which is a request that is beyond the scope of this proceeding.

44. Furthermore, DEMA submits that it and the Duke California Companies doing business in the CAISO are already subject to mitigation under the CAISO tariff and the market behavior rules. Moreover, if the CAISO mitigation requirements are modified, DEMA and the Duke California Companies will be subject to those mitigation requirements as well.

45. DEMA points out that the CAISO does not protest nor contest the fact that DEMA and its affiliates (the Duke California Companies) pass the pivotal supplier and market share screens for the CAISO market performed in accordance with the Commission's requirements. Rather, in DEMA's assessment, the CAISO is essentially proposing the use of modified models to measure DEMA's and the Duke California Companies' pivotal supplier and market share position in the CAISO market. DEMA objects to the proffer of

these modified models and argues they do not rebut the fact that DEMA satisfied the Commission's market screens and is presumed to lack generation market power.

46. Furthermore, DEMA identified a number of data and methodology flaws in the CAISO's proposed modified screens. Prominent among these are the ISO's reflection of forced outage data in calculating available supply, the import proxy, assignment of uncommitted load to DEMA's rivals, and inconsistent treatment of DEMA and rivals in terms of forced outages and load. In particular, DEMA asserts that the CAISO's analysis is flawed and unreliable in that it: (1) measures supply as nameplate capacity less outages on the minimum seasonal peak day, rather than nameplate capacity as the Commission prescribed; (2) defines maximum rival import supply as the sum of capacity scheduled into the CAISO to serve load and the amount of incremental energy bids that were not accepted on a single day, rather than the simultaneous import capability into the CAISO control area as prescribed under the Commission's orders; (3) challenges DEMA's use of public data detailing actual imports into the CAISO as a proxy for simultaneous import capability because the CAISO has not published such limit; (4) relies largely on non-public data that was available only to the CAISO, hampering verification of the results; (5) inconsistently treats DEMA and rival generators; and (6) contains several data errors.

47. Despite disagreement with the CAISO approach, in its answering comments DEMA employs the available supply and import data submitted by the CAISO, and makes additional adjustments for DEMA's forced outages and share of native load served by virtue of the requirement that certain DEMA units must offer energy into the CAISO short term market. DEMA states that the market share of it and its affiliates remains below 20 percent in the California ISO market, 5.2 percent lower than the threshold in the summer season rising to 1.4 percent below the threshold in the winter season.

48. In the April 14 and July 8 Orders, the Commission indicated that applicants and/or intervenors may submit historical sales and transmission data to rebut the presumption of screen failure, including the analyses that they believe most accurately represent market conditions.²² CAISO has submitted historical available supply and import data to assist in the Commission's examination of whether DEMA possesses potential market power in the ISO's control area when other factors are taken into account such as actual supplies available inside the ISO system and limitations of imports and hydroelectric supplies and other resources during peak periods. In answer, DEMA supplemented its initial study with an additional market share screen utilizing the supply and import data provided by the CAISO.

²² April 14 Order, 107 FERC ¶ 61,018 at P 37, n.11; July 8 Order, 108 FERC ¶ 61,026 at P 27.

49. We cannot fully rely on the results of the CAISO's screen analysis. The available supply data submitted by the CAISO reflects forced outages at a level which the Commission is unable to validate. In addition, the July 8 Order rejected the suggestion to allow deductions for forced outages, stating that forced outages are non-recurring events that do not reflect normal operating conditions.²³

50. The CAISO's import data is not based on the performance of a simultaneous transmission import study for its control area. Rather it submits a proxy for the pivotal supplier analysis based on the maximum of scheduled or metered flows net of wheeled loads, plus incremental energy bids not accepted, in the peak summer hour.²⁴ The CAISO's import proxy for the market share screen is an average of actual imports during weekday peak hours during each season. Accordingly, we cannot fully rely on the CAISO import assumptions that are based on peak hours import levels for a market share screen that examines minimum, non-peak demand times.

51. DEMA's November 19 response to the October 29 data request provided, among other things, seasonal import limitations and revised indicative screen analyses that use those import limitations and 2003 demand data that had become available since DEMA's last filing.

52. The Commission has reviewed DEMA's revised generation market power screen analyses which indicate that DEMA and the Duke California Companies pass both the pivotal supplier and wholesale market share screens in the CAISO geographic market. Accordingly, the Commission finds that DEMA and the Duke California Companies satisfy the Commission's generation market power standard for the grant of market-based rate authority.²⁵

53. The Commission denies as unnecessary CAISO's request to condition DEMA's and the Duke California Companies' market-based rate authority on the ISO's having sufficient mitigation mechanisms in place for the next three years on a system-wide and

²³ July 8 Order, 108 FERC ¶ 61,026 at P 68.

²⁴ The CAISO indicates that the import proxy is 6,441 MW at page 3 of its comments, but the explanatory footnote would indicate a limit of 6,665 MW.

²⁵ With regard to the protests filed in response to the June 25, 2001, market power analysis, we note that the Commission has now abandoned the hub and spoke analysis, as discussed in the April 14, May 13 and July 8 Orders. As a result, the protests asserting that the hub and spoke analysis is inadequate are moot.

locational basis. DEMA and the Duke California Companies analyses demonstrate that they pass the Commission's indicative screens for generation market power. In addition, Duke's plants are part of the CAISO market and are subject to the market power mitigation measures the Commission approves for that market.²⁶

54. Taking the information presented as a whole, the Commission concludes that DEMA and the Duke California Companies satisfy the Commission's standards regarding generation market power in the CAISO market.

Transmission Market Power

55. DEMA and the Duke California Companies state that they do not possess transmission market power in the respective relevant markets nor do they own, control or operate any transmission facilities other than the limited interconnection facilities owned as part of their generation facilities, which are necessary to transmit power produced from such facilities to relevant transmission grid. Duke Power, the only transmission-owning affiliate of DEMA and the Duke California Companies, does not own, control or operate any transmission facilities in California. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an OATT on file before granting such authorization. Duke Power, which is affiliated with DEMA and the Duke California Companies, states that it has an OATT on file with the Commission. We note that Duke Power's OATT was accepted in an unpublished letter order in Docket No. OA97-654-000. No intervenor has raised concerns regarding transmission market power. Based on their representations, we find that DEMA and the Duke California Companies satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

Barriers to Entry

56. DEMA and the Duke California Companies state that they do not have the ability to erect barriers to entry. Although DEMA and the Duke California Companies have affiliates that own gas interstate pipelines these interstate pipelines are also subject to the Commission's open access transportation requirements set forth in Order No. 636. Therefore, DEMA and the Duke California Companies state that neither can exercise control over sites for generating plants such that it could restrict entry by other suppliers. No intervenor has raised concerns regarding barriers to entry. Based on DEMA and the

²⁶ See *California Independent System Operator Corp., et al.*, 100 FERC ¶ 61,060 (2002); and *California Independent System Operator Corp.*, 106 FERC ¶ 61,179 (2004).

Duke California Companies' representations, we find that DEMA and the Duke California Companies cannot erect barriers to entry.

Affiliate Abuse

57. The Commission is also concerned with the potential for affiliate abuse and reciprocal dealing. DEMA and the Duke California Companies state that they operate under a code of conduct that is consistent with the Commission's requirements and that has been determined to be sufficient to prevent affiliate abuse and reciprocal dealing. No intervenor has raised concerns regarding affiliate abuse. Based on DEMA and the Duke California Companies' representations, we find that DEMA and the Duke California Companies satisfy the Commission's concerns with regard to affiliate abuse and reciprocal dealing.

58. With regard to the protests filed in response to the June 25, 2001 market power analysis, the Commission has already addressed through the course of its California market investigations the California Commission's allegations that the Duke California Companies abused affiliate relationships, in particular through its purchase of gas fuel from an affiliate company.²⁷ Therefore, the Commission need not address such allegations in this order

C. Bridgeport

Generation Market Power

59. As noted above, Bridgeport submits that it presumptively lacks generation market power under section 35.27 of the Commission's regulations because its facility was

²⁷ See, e.g., *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and California Power Exchange*, 107 FERC ¶ 61,166 at P 21 (2004), order on reh'g, 108 FERC ¶ 61,311 at P 24 (2004) (establishing that the Duke entities and other sellers in California who submitted fuel allowance claims in the course of the investigation and refund proceedings may only present the actual cost of fuel incurred by the affiliate who first obtained the fuel, and may not present intra-corporate valuations at spot prices); see also, e.g., *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and California Power Exchange*, 95 FERC ¶ 61,418 (2001) (Order on Rehearing of Monitoring and Mitigation Plan for the California Wholesale Electric Markets, Establishing West-Wide Mitigation, and Establishing Settlement Conference).

constructed after July 9, 1996. If an applicant sites generation in an area where it or its affiliates own or control other generation assets, the applicant must study whether its new capacity, when added to existing capacity, raises generation market power concerns.²⁸

Bridgeport states that it presumptively lacks generation market power under this regulation because its facility was constructed after July 9, 1996, and further notes that the only generation-owning affiliate of its parent company located in the area, Casco Energy, also presumptively lacks generation market power under section 35.27 of the Commission's regulations.²⁹ Based on these representations, we find that Bridgeport satisfies the Commission's generation market power standard for the grant of market-based rate authority.

Transmission Market Power

60. Bridgeport states that neither it nor its affiliates possesses transmission market power. Bridgeport notes that neither it nor its affiliate Casco Energy, the only Duke Energy affiliate owning generation in the ISO New England region, controls or operates any transmission facilities other than certain interconnection facilities necessary to transmit the power they generate to the grid. Additionally, Bridgeport states that Duke Power, its only transmission-owning affiliate, does not own transmission facilities in or interconnected with ISO New England, and provides transmission service in accordance with an OATT on file at the Commission. We note that Duke Power's OATT was accepted in an unpublished letter order in Docket No. OA97-654-000. No intervenor has raised concerns regarding transmission market power. Based on Bridgeport's representations, we find that Bridgeport satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

Barriers to Entry

61. Bridgeport asserts that neither it nor its affiliates has the ability to erect barriers to entry. Bridgeport notes that while its parent Duke Energy has affiliates that own interstate gas pipelines, such pipelines operate subject to the Commission's open access transportation requirements in Order No. 636, effectively mitigating any ability to erect

²⁸ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 69, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

²⁹ We note that the Commission intends to address as part of the generic rulemaking proceeding in Docket No. RM04-7-000 whether to retain or modify section 35.27 of its regulations.

barriers to entry. No intervenor has raised concerns regarding barriers to entry. Based on Bridgeport's representations, we find that Bridgeport cannot erect barriers to entry.

Affiliate Abuse

62. Bridgeport states that there is no likelihood of affiliate abuse with respect to itself and its affiliates. Bridgeport notes that it operates under a code of conduct with regard to conducting business with an affiliated franchised public utility, and that under its market-based rate tariff, it has committed not to make any wholesale power sales to, or power purchases from, an affiliate public utility with a franchised electric service area unless it first obtains approval from the Commission in a separate filing under section 205 of the FPA. No intervenor has raised concerns with regard to affiliate abuse. Based on Bridgeport's representations, we find that Bridgeport satisfies the Commission's concerns with regard to affiliate abuse.

Filing and Reporting Requirements

63. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.³⁰ Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.³¹

³⁰ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/Electric/eqr/eqr.htm>.

³¹ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

64. With regard to reporting changes in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing, in a Notice of Proposed Rulemaking in Docket No. RM04-14-000, the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates.³² Accordingly, the change in status reporting obligation for each of the Duke Companies is subject to the outcome of the rulemaking.

The Commission orders:

(A) Bridgeport's updated market power analysis is hereby accepted for filing as discussed in the body of this order.

(B) The updated market power analyses of DEMA and the Duke California Companies are hereby accepted for filing as discussed in the body of this order.

(C) Duke Power's updated market power analysis for all relevant markets not subject to the section 206 proceeding is hereby accepted for filing, as discussed in the body of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-4-000 concerning the justness and reasonableness of Duke Power's market-based rates, as discussed in the body of this order.

(E) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-4-000.

(F) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (B) above.

³² Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004).

(G) For the Duke Power control area, Duke Power is directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.